MENANG DEVELOPMENT (M) SDN. BHD.

v.

PEMBINAAN K & H SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J
[ORIGINATING SUMMONS NO. D3-24-48 TAHUN 1991]
6 APRIL 1993

INJUNCTION: Application for injunction to restrain defendant from presenting winding - up petition - Failure by plaintiff to honour architects interim certificates - Plaintiff challanging certificates - Whether challange to the certificates bona fide -Whether injunction should be granted.

The plaintiffs were housing developers who appointed the defendants as contractors for their project. The plaintiffs applied for an injunction to restrain the defendants from presenting a winding-up petition against them in respect of the balance of the amounts certified due and payable by means of interim certificates issued by the architects appointed by the developers in respect of the building works the subject of a building contract between the plaintiffs and the defendants.

The plaintiffs challanged the certificates on the ground that the works carried out were defective and not according to specifications entitling them to retain the sums due under the certificates for remedial works. The question that arose was whether the challange to the certificates was *bona fide.*

Held:

[1] During the whole of the period that the interim certificates were being issued the plaintiffs had consultants in the form of engineers and architects assisting them. At no stage was there any protest at the issue of any of the certificates. There was no evidence of any complaints of defective works save in respect of minor matters during the whole of the period when the interim certificates were being issued.

[2] As to the *bona fides* of the challenge to the certificates what is relevant is the position that obtained at or about when each certificate was scheduled to be honoured by payment. The complaints of the plaintiff appeared to be contrived and were clearly based on afterthoughts.

[3] The certificates were not honoured on the due dates or within a reasonable period of the due dates for any good reason. They were not honoured either because the plaintiffs were unreasonably not willing to settle their debts or were not capable of making the payments.

[Application for injunction dismissed with costs].

Cases referred to:

Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd. [1974] AC 689 ***(refd)***

Alliance (M) Engineering Co. Sdn. Bhd. v. San Development Sdn. Bhd. [1974] 2 MLJ 94 ***(refd)***

For the plaintiffs - T.J. Su; M/s. Cheah Teh & Su
For the defendants - Shahul Hamid Amiruddin; M/s. Hamid Tung & Kumar

JUDGMENT

V.C. George J:

This is an application for an injunction to restrain the defendant contractors from presenting a winding-up petition against the plaintiff developers in respect of the balance of the amounts certified due and payable by means of interim certificates issued by the architects appointed by the developers in respect of the building works the subject of a building contract between the plaintiff developers as developers of the project at Rasah Jaya Seremban known as Galaria consisting of 42 units of double-storey shop-houses and the defendant contractors as main contractors.

Ten interim certificates and one variation order had been issued between February 1990 when the works commenced and December 1990, the total value of which was RM2,443,534.28 of which only RM1,086,724.12 had been paid leaving a balance of RM1,356,810.16. The contract provides that interim certificates are to be issued on a monthly basis and have to be honoured within 30 days of the date of issue of the certificates. The contract also provides that 10% of the certified value up to a maximum of 5% of the total contract sum (which was some RM3.6 million) was to be retained as a retention fund for a period of 12 months from the completion of the works. The architects had certified that

some RM186,000 (well within the 10% retention allowed) was to be retained in respect of the interim certificates that had been issued. The retention fund is to be utilised by the developers to make good defects (if any) in the works carried out by the contractors.

By a letter dated 13 December 1990 the contractors complained somewhat bitterly to the developers in respect of the alleged persistent non-honouring of interim certificates and pointing out that the balance due was about 50% of the total certified amounts. There does not appear to have been any written reply to this letter. On 28 December 1990 the contractors' solicitors followed up their clients' letter with a formal demand for the RM1,153,996.28 said to be owing and ended up the letter with a threat that non-compliance with the demand would result in termination of the contract by the contractors.

After receipt of the letter of 28 December 1990 the plaintiffs sent to the defendants a cheque for RM40,000 which was accepted on 4 January 1991 on a without prejudice basis.

Simultaneously (it would seem) with the payment of the RM40,000 the plaintiffs' solicitors wrote their letter of 4 January 1991 to the defendants' solicitors stating that it was their clients' instructions that the works had been executed not in accordance with the specifications and quality required and were in fact defective. They went on to state that their clients "have discovered defects which reasonable inspection or examination at any reasonable time during the carrying out of the works or before issue of the said certificates would not have discovered". They also say that their instructions were that despite repeated requests and demands the defendants had "failed, refused and/or neglected to rectify or make good the defects." They end the letter by contending that as substantial expenditure would be incurred for rectification works and because they have a claim for substantial sums by way of damages against the defendants the contention that they were obliged to pay the balance of the amounts certified by the architects was denied.

The contractors' solicitors then wrote their letter of 8 January 1991 informing the plaintiffs that the contractors were terminating the contract because of the failure to pay the amount claimed save the RM40,000.

The application herein filed on 5 March 1991, was designed to be disposed of as an, *ex parte* application and was supported by encl. (2) the affidavit of Kang Chong Jin the Project Manager of the plaintiffs and encl. (3) the affidavit of Cheah Yew the Executive Director of the plaintiffs. Because of a certificate of urgency under the hand of Counsel for the plaintiffs the application was brought before me on 6 March 1991. I was not prepared to give the plaintiffs the orders sought on an *ex parte* basis and accordingly had the application adjourned to 27 March 1991 to be heard *inter partes*. In the interim a holding order to obtain until disposal of the application *inter partes* (or further order) was given restraining the defendants from presenting any petition to wind-up the plaintiffs. The application came up on a number of occasions and for one reason or the other was adjourned from time to time. On 22 May 1991 the application was part-heard when, because it was after 4.00 p.m., the hearing was adjourned to another date for Mr. Su of Counsel for the plaintiffs to continue with his submissions. Thereafter the plaintiffs filed yet another affidavit also by Cheah Yew affirmed on 9 July 1991 to which was attached exhibit CY-5 which was identified as a copy of a report by a firm of engineers and which purported to set out particulars of the defects in the works in the Galaria project and the estimate of the costs of the remedial works which appear to be RM806,460.23. The consultants also have calculated what they consider is the quantum of liquidated damages payable by the defendants to the plaintiff. The amount they have is RM284,602.74. That appears to have been calculated on the assumption that the defendants were not justified in terminating the contract as they did. The engineers also appear to state that the defendants will also be liable for the cost of completing the works which they estimate will be RM721,708.28.

Unless they are contractually injuncted from doing so interim certificates of the nature issued by the architects in this instant case can be challenged - *Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* [1974] AC 689 followed in *Alliance (M) Engineering Co. Sdn. Bhd. v. San Development Sdn. Bhd.* [1974] 2 MLJ 94. The challenge, however, has to be *bona fide*. The defendants contend that the challenge here is not *bona*

fide. It is according to them a sham concocted to attempt to prevent the defendants from having the plaintiff company wound-up on the ground that it is not capable of settling its debts.

During the whole of the period that the interim certificates were being issued the plaintiffs had consultants in the form of engineers and architects assisting them. In fact the certificates were issued by the plaintiffs' architects. Further the Executive Director of the plaintiffs is a qualified Civil Engineer. At no stage was there any protest at the issue of any of the certificates. There is no evidence of any complaints of defective works save in respect of minor matters during the whole of the period when the interim certificates were being issued. Counsel for the defendants pointed out that there were contemporaneous documents in the form of minutes of site meetings which prove this and which also shows that complaints were made at these meetings of the plaintiffs not paying up on the certificates.

Contractually each of the certificates had to be honoured within 30 days of issue.

The defects that the plaintiffs now complain about were clearly (and can be said to be admittedly) not known to the plaintiffs when the interim certificates were issued.

There had been regular site meetings at most if not all of which the representatives of the plaintiff developers, the defendant contractor, the architects and the engineers were present. Minutes of 11 of these meetings held between March 1990 and December 1990 have been exhibited. At these meetings reports on the quality of the work of the contractors and the progress of the works were made. Instructions given by the engineers and/or architects to the contractors were minuted.

These minutes do not show that complaints of any significance had been made of the quality of the work. The minutes also show that complaints when made resulted in instructions being given to the contractors who appear to have carried out the instructions. For example, at the meeting on 6 July 1990 the contractors were told to rectify some problem with the concrete floor slab. At the meeting on 3 August 1990 it was recorded that rectification work has been done on the crack that had appeared on the floor slab. At that meeting the contractors were required to submit test cubes pertaining to concreting to the developer and to the engineers. A month later on 6 September 1990 it was recorded that the test cubes tests had been submitted as required. It was also recorded that no further defects have been found on the concrete floor. At the meeting on 4 October 1990 it was recorded that the results of the test cubes "are in order".

Apart from this sort of complaints which appear to be of a routine nature and appear to have been sorted out, neither the engineers nor the architects nor the developers themselves appear to have made any significant complaints - not even when, at site meeting after site meeting, the contractors complained bitterly (the complaints are recorded in the minutes) of the delay in making progress payments. Complaints of delay are recorded in the minutes dated 3 August 1990, 6 September 1990, 4 October 1990, 18 October 1990, 12 November 1990, 15 November 1990 and 13 December 1990.

Apart from complaining at site meetings the contractors had been writing long letters, some of them almost rude letters, complaining about the non-payment of amounts as certified as due and payable by the developers' own architect. Letters of 30 June 1990, 10 August 1990, 22 August 1990, 22 September and 3 December 1990 as well as that of 13 December 1990 which has been referred to hereinbefore had been sent by the contractors complaining of the inordinate delay in payment of moneys due, appear to have been ignored. It is noteworthy that neither the developers nor the architects nor the engineers had come up with even a hint at the said site meeting or when those letters were received that the reason for non-payment was that the quality of the work of the contractors was questionable.

It was only when the contract was to be terminated by the contractors that, on 4 January 1991, the solicitors for the developers wrote saying that the amounts though certified were disputed on the ground that the works executed were not according to specification and quality.

They go on to state that "despite repeated requests and demands your clients have failed,

refused and/or neglected to rectify or make good the defect". There is no evidence of any such requests and demands and no particulars of the alleged defects appear to have been given to the contractors up to that stage. The Court has to accept that in fact those contentions of repeated demands and requests are untrue.

It was only on filing the instant application on or about 5 March 1991 that the developers have come up with particulars of the alleged defects. This was done by its project manager in his affidavit encl. (2) stating at paragraph 11(e) "these are now shown to me in one bundle the copies of the photographs depicting the defective and dangerous workmanship of the defendants ..."

In purported support of the contention that they are not liable to pay the balance of the certified amounts amounting to RM1,356,810.16 the plaintiffs' project manager could only produce two letters of their engineers exhibited to encl. (2) as exhibit KCJ. 10a and 10b. 10(a) dated 12 June 1990 was nothing more than pointing out that the vertical props provided for the floor slabs and beam after removal of the shuttering were insufficient. 10(b) is an instruction to the contractors by the engineers to hack and reconcrete the floor slab. The minutes of site meetings show that the second problem had been satisfactorily sorted out and since there does not appear to be further complaints in respect of the 10(a) problem it can reasonably be presumed that the contractors adhered to the instructions of the engineers to provide more props. All that the plaintiffs could manage to produce from the architects was one letter. It was dated 11 May 1990 and also dealt with the ground floor crack. No further letters of the architects are shown suggesting that there were no other complaints from the architects.

It seems to me that what the project manager had to say in support of the plaintiffs' contention (and which is what the plaintiffs' executive director by his affidavit encl. (3) relied on) that the Court should support the plaintiffs in its contention that what was certified as not payable is so ludicrous as to verge on being frivolous and vexatious. The report of Setia Runding Sdn. Bhd. who carried out an inspection of the defects pointed out by the plaintiffs' project manager in his affidavit encl. (2) confirms the ludicrousness of the plaintiffs' contention. The consultant engineers were of the opinion that the defects relied on by the plaintiffs in filing the originating summons could be rectified for RM3,151.50!

I am more than satisfied that the certificates were not honoured on the due dates or within a reasonable period of the due dates for any good reason. It follows that they were not honoured either because the plaintiffs were unreasonably not willing to settle their debts or were not capable of making the payments.

Even when this originating summons was issued on 5 March 1991 it would seem that, apart from vague contentions of defective works, there was nothing of substance in the plaintiffs' contentions of defective work. There is no explanation as to why their own architects and engineers have not backed up the contention of defective work. It was some 6 months or so after the defendants had vacated the site that the plaintiffs chose to get other consultants to inspect and report on the alleged defects. What they could report is the position obtaining after a partly completed job that had been abandoned for 6 months or so. It is relevant to note that even their consultants confirm that the defects relied on by the plaintiffs as set out in enclosures (2) and (3) not to pay off the contractors could have been rectified with a portion of the amount of the retention fund. Also these consultants' opinion of the liability of the contractors to pay damages and their opinion that the defendants should at their expense complete the works are legal opinions in respect of which they have no expertise.

As to the *bona fides* of the challenge to the certificates what is relevant is the position that obtained at or about when each certificate was scheduled to be honoured by payment. The complaints of the plaintiffs appear to be contrived and are clearly based on afterthoughts. There has not been a *bona fide* challenge to the certificates.

The application should have been and is dismissed with costs.